INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXVIII, NO. 2 **January 26, 2001**

CRIMINAL LAW ISSUE

MAHONE v. STATE, No. 45A04-9911-PC-487, ___ N.E.2d ___ (Ind. Ct.. App. Jan. 22, 2001). MATTINGLY, J.

Mahone contends that as he could not file a PCR petition during the pendency of a federal habeas corpus petition, he did not unreasonably delay.[5] Neither the State nor Mahone directs us to statutory or common law authority that prohibits filing concurrent petitions in the state and federal courts. The *Appendix to Indiana Rules of Procedure for Post-Conviction Remedies Rule 1* provides a form that requests a petitioner list filings in other courts with respect to the conviction. However, neither the requests within questions 10 and 11 of the *Appendix* nor any rules related to Indiana petitions for post-conviction relief explicitly prohibit concurrent filings. Similarly, neither the State nor Mahone direct us to a federal rule denying jurisdiction to Mahone at the point where the federal court accepted jurisdiction of his habeas corpus petition. Although the federal rules require that a petitioner must exhaust all available state court remedies prior to seeking federal habeas corpus relief, s*ee Rose v. Lundy*, 455 U.S. 509 (1982), there is no parallel requirement in the Indiana PCR rules.

We decline to hold that time attributed to pursuing a federal remedy must necessarily be categorized as "delay," but absent a prohibition against concurrent filings, we cannot characterize Mahone's five year and seven month delay as anything other than unreasonable. Nonetheless, this does not end our inquiry; the State must also prove that it was prejudiced by the delay. *Twyman v. State*, 459 N.E.2d 705, 712, (Ind. 1984).

. . . .

We are reticent to accept a finding of unavailability where the investigator's search for witnesses was conducted four years prior to the PCR hearing. . . .

Based on the investigator's out-of-date information, along with the investigator's failure to further attempt to find Redie Peterson and Jerome Buck, who both lived in the jurisdiction, and the investigator's failure to query the out-of-state witnesses as to whether they would return to testify, we find that the State has not demonstrated that the opportunity for a successful prosecution was materially diminished by the passage of time attributable to Mahone's neglect, [citation omitted]. . . .

. . . .

[5] The State noted during Mahone's post-conviction proceedings that one could not file a PCR petition during the pendency of the habeas action. [Citation to Record omitted.]

MATHIAS and ROBB, JJ., concurred.

CIVIL LAW ISSUES

TURNER v. CITY OF EVANSVILLE, No. 82S05-0008-CV-479, ___ N.E.2d ___ (Ind. Jan. 18, 2001).

SHEPARD, C. J.

> The Chief of the Evansville Police Department imposed discipline on an officer, who appealed to the City's Police Merit Commission. The officer then sued the Commission, the Chief, and others, seeking to prevent a hearing on the merits of his appeal and challenging the Chief's right to hold office, the lawfulness of the Commission's existence and the validity of an agreement between the City and the Fraternal Order of Police. We hold that these matters may be the subject of review sought after any final decision of the Commission but may not be pursued collaterally through this lawsuit.
>
> . . . .
>
> Turner was required to pursue his administrative remedies and may not avoid doing so through this collateral action. [Footnote omitted.] Consequently, the trial court lacked subject matter jurisdiction to address the merits of Turner's amended complaint.
>
> Having heard the City's motions, the trial court granted summary judgment and also ordered dismissal. It was the latter action that was appropriate. . . .

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

BOEHM, J., filed a separate written opinion in which he concurred and in which DICKSON and RUCKER, JJ., joined, in part, as follows:

> I join in the opinion of the Court. Because that opinion adequately disposes of this case, I would normally be content to leave resolution of the issue presented by the merits of this case for another day. However, the Court of Appeals addressed an important question in holding that the Indiana Constitution requires that the police chief reside within the Evansville city limits.
>
> I agree that Turner has no standing to raise that issue in this lawsuit. Nevertheless, for better or worse, the Court of Appeals has resolved the issue in a published opinion that I assume affects a number of public safety officials and perhaps others serving local governmental units across Indiana. Rather than leave these public servants in doubt as to the need to resign their positions or relocate their families, I would address the question of who is an "officer" within the meaning of Article VI, Section 6 of the Indiana Constitution. It is my view that the Evansville Chief of Police is not subject to the residency requirement in Article VI, Section 6.

> . . . .
>
> It seems to me that the "officers" contemplated by this constitutional provision are those identified in the Indiana Constitution itself as "officers" and those county, township, and town officials who have been identified by statute as those who, in the terms of Article VI, Section 3, are elected or appointed "by law" to perform similar functions. I assume no one would argue that every statutorily provided public employee is an "officer" for these purposes. If that is correct, some rather bright line is required here to permit these public servants and their employers to go about their business with confidence that there will not be constant skirmishing over eligibility to hold municipal and county jobs.
>
> Since 1863, a number of appellate decisions have struggled to determine which local officials are "officers" within the meaning of Article VI, Section 6. Everyone seems to agree that the term, at a minimum, embraces the "officers"

identified as such in the constitution itself. These are the county clerk, auditor, recorder, treasurer, sheriff, coroner, and surveyor. In addition, the senior legislative components of local government are required to live in their jurisdictions. All of the foregoing are elected to their posts. Some decisions have held other public servants to be constitutional officers. [Citation omitted] ("Members of a board of commissioners are certainly county officers . . . ."); [citation omitted] (county recorder is "officer"); [citation omitted] (county auditor is "officer"); [citation omitted] (members of the city Board of Public Works and Safety are "officers"); [citation omitted] (township justice of peace is an "officer").

In 1980, the General Assembly imposed residency requirements on twenty county, township, and town positions that were specifically identified as subject to Article VI, Section 6.[3] This list did not include any law enforcement personnel beyond the constitutionally created office of county sheriff. In addition to the list tied specifically to Article VI, Section 6, a variety of statutes impose other residency requirements. [Citation omitted] (prosecuting attorney must reside in same judicial circuit); [citation omitted] (corporation counsel of city with population greater than 6,000 must live within county); [citation omitted] (citizen members of plan commission must be residents of the jurisdictional area of the commission); [citation omitted] (redevelopment commissioner must be resident of unit that he serves); [citation omitted] (member of merit commission must have been resident of local unit for three years before appointment); [citation omitted] (members of police and fire departments must live within county where city, town, or township is located, or in a contiguous county).

Although this Court is certainly not bound by the legislature's interpretation of the term "officer" as used in Article VI, Section 6, it seems to me that the General Assembly's conclusions are correct. The top executive individuals and bodies of counties, towns, and townships are included, as are the analogs to the constitutionally created offices. The elected sheriff, who reports to no one, is the sole law enforcement official on the list. In contrast, a city chief of police normally is accountable to a mayor, a board of safety or merit commission, or both. . . .

I agree that various public servants, including chiefs of police, may be "officers" within the meaning of some statutes. However, this is purely a matter of legislative construction. . . . Moreover, the word "officer" is used in various statutes to describe a number of public servants whom no one would identify as constitutional officers. For example, although the code refers to "law enforcement officers," I do not believe that anyone would suggest that every policeman or deputy throughout the state of Indiana is subject to Article VI, Section 6. Secondly, the test sometimes cited for identifying an "officer"—one who exercises

"sovereign authority"—clearly applies to law enforcement and regulatory officials.

In sum, practical considerations of geography and limited communication undoubtedly influenced the constitutional residency requirement at its origin. These are no longer as significant, but the assumed goals of political accountability and familiarity with local issues remain. In my view, neither goal is sufficiently served by extension of Article VI, Section 6 to an appointed city chief of police who is himself accountable to a layer of constitutional officers.

---

[3] Those positions are: city court judge (Ind.Code § 33-10.1-3-2 (1998)); member of the county "executive" (id. § 36-2-2-5); member of the county "fiscal body" (id. § 36-2-3-5); county auditor (id. § 36-2-9-2); county treasurer (id. § 36-2-10-2); county recorder (id. § 36-2-11-2); county surveyor (id. § 36-2-12-2); county sheriff (id. § 36-2-13-2); county coroner (id. § 36-2-14-2); county assessor (id. § 36-2-15-2); executive of UNIGOV (id. § 36-3-3-4); city-county council of UNIGOV (id. § 36-3-4-2); mayor (id. § 36-4-5-

2); common council/city legislative body (id. § 36-4-6-2); city clerk (id. § 36-4-10-3); town legislative body (id. § 36-5-2-6); town clerk-treasurer (id. § 36-5-6-3); township trustee (id. § 36-6-4-2); township assessor (id. § 36-6-5-1 (Supp. 2000)); and township legislative body (id. § 36-6-6-3 (1998)).

SEARS ROEBUCK AND CO. v. MANUILOV, No. 73S01-0002-CV-119, ___ N.E.2d ___ (Ind. Jan. 23, 2001).

DICKSON, J.

The defendant-appellant, Sears Roebuck and Co., appeals following a jury trial and judgment awarding compensatory damages of $1,400,000 to the plaintiff-appellee, Milan Manuilov, a 34-year old circus high-wire performer who was injured in 1988 while shopping at the defendant's retail store. The Court of Appeals reversed and remanded for a new trial. Sears Roebuck and Co. v. Manuilov, 715 N.E.2d 968 (Ind. Ct. App. 1999). . . . We affirm the judgment of the trial court.

The defendant first contends that the trial court improperly excluded evidence of the plaintiff's prior domestic violence, criminal history, and untruthfulness. Specifically, the defendant argues that the trial court erroneously precluded it from calling the plaintiff and his girlfriend to testify on these matters.

The portion of the record submitted on appeal indicates that, at the conclusion of the plaintiff's case-in-chief but before the defendant began presentation of its evidence, the trial court conducted a conference with counsel outside the presence of the jury. Asserting that defense counsel, contrary to alleged representations the prior day, intended to call the plaintiff and his friend, Helen Kurihara, as witnesses, the plaintiff's counsel requested an in-camera session to determine what the defense intends to ask "because it may be extremely prejudicial in front of this jury." [Citation to Record omitted.] Counsel for the plaintiff expressed concern about the potential for a mistrial.[1] . . .

The defendant's counsel noted that Dr. Martin Blinder, a psychiatrist who had testified regarding the plaintiff's post-concussion syndrome, had testified that the plaintiff was not a malingerer based in part upon information provided by the plaintiff. Defense counsel observed that Dr. Blinder noted that there were about thirty different possible factors and argued that the plaintiff failed to disclose to his doctor "one of these factors that go to the malingering opinion." [Citation to Record omitted.] When directed by the trial court to identify the factor, defense counsel at first refused to comply except to name three possibilities: the plaintiff's work record, his school discipline record, and his doing "unsavory" things. [Footnote omitted.] After further encouragement from Judge O'Connor, defense counsel handed the judge, but not opposing counsel, a fax document that defense counsel said he received the previous night and which purportedly identified the matter sought to be raised by the defense.

. . . .

With the jury still out of the courtroom, the defense then called the plaintiff to the stand and asked several questions about an alleged previous incident of violence against the plaintiff's girlfriend. . . .

The seven page exhibit consisted of: (a) an Application for Temporary Protective Order alleging that the plaintiff had threatened and committed acts of violence against Helen Kurihara in Nevada two years earlier; (b) the Court Master's recommendation that the order be granted; (c) the Clark County Nevada District Court's Temporary Protective Order Against Domestic Violence; (d) proof of service; and (e) minutes of the resulting court hearing in which both parties testified and, upon the applicant's request, the protective order was dissolved.

Following further arguments from both counsel, Judge O'Connor prohibited the defense from presenting the information to the jury, explaining his reasoning as follows:

> Obviously, I'm concerned, certainly the plaintiff's credibility is an issue at this point because of the information that was divulged. The timing of the divulging of the information really strikes me as being interesting, but I don't have any control over that except through my deadlines and cut-off dates. The prejudicial impact of the jury receiving this information, regardless of what kind of limiting instructions the court gave or cautioned or so forth, would far outweigh, in my opinion, the probative value. Of course, on the other hand, we don't know what Dr. Blinder's response would be to how this information would affect his opinion about the plaintiff. So I'm really caught in a dilemma. . . . Keeping all those factors in mind and understanding the pros and cons and the plusses and minuses and the prejudice to both sides, the time of day and where we are, and in view of how the information appeared into the . . . fourth full day of trial, with very little opportunity for there to be any investigation, other than what occurred in the courtroom by the opposing party, it's my determination that, and I think the offer to prove is sufficient for the record, that this information will not go to the jury. [Citation to Record omitted.]

Indiana Evidence Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." . . .

Urging that the excluded evidence was highly relevant and probative upon the issue of malingering, the defendant cites Barnes v. Barnes, 603 N.E.2d 1337, 1342 (Ind. 1992), and City of Indianapolis v. Swanson, 448 N.E.2d 668, 671-72 (Ind. 1983), to support his demand for a new trial. The defendant argues that a trial court may only balance marginal evidence against prejudicial evidence and that it "has no discretion to exclude evidence that is better than marginal." [Citation to Brief omitted.]

Our opinion in Barnes held that the Indiana Rape Shield Statue does not apply in civil cases to exclude evidence of a plaintiff's prior sexual activities. We expressly noted that a trial court's latitude to exclude prejudicial evidence was limited: "relevant evidence—that which logically tends to prove a material fact—is not inadmissible simply because of its prejudicial impact." 603 N.E.2d at 1343. . . . Both these decisions preceded the adoption of the Indiana Rules of Evidence in 1994 and this Court's specific adoption of Rule 403's federal counterpart in Hardin v. State, 611 N.E.2d 123, 128-29 (1993). Contrary to the limitations applied in Barnes and Swanson, the rule expressly authorizes trial courts to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The rule does not limit exclusion only to marginally probative evidence.

. . . .

Considering the circumstances presented, the presumptive correctness of the trial court's ruling, and its thoughtful evaluation, we decline to find an abuse of discretion in excluding the evidence.

. . . .

If applied to separately evaluate every subsidiary point made during the testimony of a qualified expert regarding matters based on reliable science, Rule 702(b) can become excessively burdensome to the fair and efficient administration of justice. It directs the trial court to consider the underlying reliability of the general principles involved in the subject matter of the testimony, but it does not require the trial court to re-evaluate and micromanage each subsidiary element of an expert's testimony within the subject. Once the trial court is satisfied that the expert's testimony will assist the trier of fact and that the expert's general methodology is based on reliable scientific principles, then the accuracy, consistency, and credibility of the expert's opinions may properly be left to vigorous cross-

examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact. [Citation omitted.]

. . . The medical testimony was presented from clearly qualified expert witnesses as to matters that assisted the jury. The trial court did not abuse this discretion when it admitted the causation testimony of Dr. Quillen, the emergency room doctor who treated the plaintiff at the time of his injury but not in the intervening period of almost ten years to the time of trial. Nor did the court exceed its latitude when it permitted Dr. Quillen and Dr. Blinder to testify regarding post-concussion syndrome after considering and rejecting the defendant's claim that it was not based on reliable scientific principles. The medical testimony explained the basis for this diagnosis. Notwithstanding robust cross-examination and argument of defense counsel, Judge O'Connor overruled defense counsel's objections. We decline to find as a matter of law that a medical diagnosis of post-concussion syndrome is scientifically unreliable. We further find that the trial court was not required to exclude Dr. Blinder's causation opinions in response to the defendant's claims that organic and physical brain damage were not directly within his area of expertise as a physician and psychiatrist. These are matters of weight and credibility and were vigorously raised for the jury's consideration, and they do not require us to find error in the admission of the evidence.

. . . .

RUCKER, J., concurred.

SULLIVAN, J., concurred, except as to the section of the opinion captioned "Medical Testimony" as to which he concurred in the result, without filing a separate written opinion.

BOEHM, J., filed a separate written opinion in which he dissented, and in which SHEPARD, C. J., concurred, in part as follows:

I respectfully dissent because, in my view, the first and second issues addressed by the majority are not independent of each other, and, in concert, produce a flawed trial. . . .

. . . .

The balance under Indiana Evidence Rule 403 between probative value and prejudice is a matter of trial court discretion and this ruling was made under difficult circumstances by an experienced and highly respected trial judge. Certainly in normal circumstances that balance would preclude evidence of domestic violence or a minor criminal record even if marginally relevant. Here, however, the evidence was offered to rebut factually incorrect testimony that Manuilov had purposefully elicited to bolster his claim. In my view, Manuilov opened the door as wide as it can get. It is simply unfair to permit a party to open up the subject of his own truthfulness, put on an expert to bolster it based on false factual assumptions, and then successfully oppose evidence that undercuts those assumptions under a claim of prejudice. I believe the Court of Appeals majority was correct in ordering a new trial.

PATEL v. BARKER, No. 45A03-0003-CV-96, ___ N.E.2d ___ (Ind. Ct. App. Jan. 10, 2001).

KIRSCH, J.

Barker filed a suit for medical malpractice against Patel. At trial, Barker claimed that Patel breached the standard of care in two ways: by suturing the colon in such a way that it leaked and by leaving a hemoclip on her ureter. The case was tried to a jury, which awarded Barker $1,800,000 in damages. The trial court reduced the award to $1,500,000, in compliance with the Indiana Medical Malpractice Act limitation of $750,000 in damages per act of malpractice. Patel now appeals.

Patel first argues that the acts about which Barker complains constitute one "occurrence" under the Indiana Medical Malpractice Act. . . .

. . . .

Thus, the cases have interpreted the Act as allowing only one recovery when multiple breaches lead to a single injury and multiple recoveries when multiple breaches during

more than one procedure lead to multiple injuries. Here, we face the unique case where multiple breaches during a single procedure lead to multiple injuries. Nonetheless, we see no principled reason why this distinction should require a different analysis. Rather, the limitation on recovery applies to "an injury or death," not "an act of malpractice." Here, it is undisputed that Barker had two distinct injuries from two distinct acts of malpractice to two separate body systems, her digestive system and her urinary system. Thus, we believe the plain language of the Act allows for recovery up to the cap amount on each claim arising from separate acts of malpractice resulting in separate injuries.

We hold that the Indiana Medical Malpractice Act allows for one recovery for each distinct act of malpractice that results in a distinct injury, even if the multiple acts of malpractice occur in the same procedure. The trial court did not err in allowing separate recoveries each subject to the statutory cap.

. . . .

DARDEN, J., concurred.

FRIEDLANDER, J., filed a separate written opinion in which he dissented, in part, as follows:

I agree with the majority to the extent that it characterizes the question as one involving "multiple breaches during a single procedure." [Citation omitted.] The majority focuses upon the "multiple breaches" in concluding that there were two incidents of medical malpractice under the Act. I, on the other hand, believe that the dispositive fact is that Barker's allegation's stem from a single surgery.

. . . .

INDIANA FIREWORKS DISTRIB. ASS'N v. BOATWRIGHT, No. 49A02-0004-CV-225, ___ N.E.2d ___ (Ind. Ct. App. Jan. 11, 2001).

MATHIAS, J.

Fireworks raises three issues on appeal, which we restate as the following dispositive issue: Whether an individual, acting in his official capacity as the head of a state agency, is a "person" under Indiana Code sections 34-14-1-2 and –13 such that he may bring a declaratory judgment action.

. . . .

Fireworks relies on our supreme court's recent opinion in Indiana Wholesale Wine & Liquor Co, Inc. v. State ex rel. Indiana Alcoholic Beverage Com'n, 695 N.E.2d 99 (Ind. 1998). In that case, the court observed that the Indiana Alcohol Beverage Commission could pursue a declaratory judgment action "due to the unique nature of Ind. Code § 7.1-2-8-3," while also noting that "the Commission could not have maintained a similar action under the Uniform Declaratory Judgment Act." Id. at 103. In a footnote, the court explained, "[p]ursuant to Ind. Code § 34-4-10-2 & -13, state agencies lack standing to seek declaratory judgments." Id. at 103 n.7.

. . . .

[A]lthough it is clear under Indiana Wholesale that "state agencies" may not seek declaratory relief under the statute, the case does not explicitly address whether a state official, acting in his official capacity, may do so. We turn to the rules of statutory construction to answer that question.

. . . .

For all of these reasons, we hold that a state official, acting in his or her official capacity, may not bring a declaratory judgment action pursuant to Indiana Code sections 34-14-1-2 and –13. . . .

MATTINGLY and ROBB, JJ., concurred.

MAJOR v. OEC-DIASONICS, INC., No. 50A03-9910-CV-392, ___ N.E.2d ___ (Ind. Ct.. App. Jan. 18, 2001).

DARDEN, J.

Ralph Major, Jr. appeals the trial court's order foreclosing the attorney fee lien of the firm of Jones, Obenchain, Ford, Pankow, and Lewis ("the Firm"[footnote omitted]) in the amount of $970,261.75 against the $3,138,118.00 judgment won by Major in Major v. OEC-Diasonics, Inc., [footnote omitted] and the Firm cross appeals.

. . . .

In a February 1999 hearing on the attorney's lien foreclosure action, the trial court judge, Michael Cook, advised that during the 6½ years that had elapsed since the Major v. OEC trial, his brother had been represented by Mysliwiec. Upon Major's request, Judge Cook recused himself. A special judge was then appointed to consider the lien action. [Footnote omitted.]

. . . .

The trial court also considered testimony about "what he observed" from a deposition by Judge Michael Cook.[8] (R. 1649). Judge Cook indicated that Major v. OEC was "not simply a trial on damages" but involved "a great number of both factual and legal issues." (R. 2708). He praised the extremely "orderly fashion" in which the Firm presented "a mass of information." [Citation to Record omitted.] He stated that in his more than twenty years on the bench, this was the only case where he awarded more than $1 million. Based upon his observation of the difficult issues involved and the presentation by the Firm, Judge Cook opined that a 40% fee would be reasonable, given "the dollar amount" of the judgment and "going to the Supreme Court." [Citation to Record omitted.]

. . . .

Major next claims that the trial court erred in admitting the deposition testimony of Judge Cook, who presided over the original Major v. OEC trial. He cites Cornett v. Johnson, 571 N.E.2d 572 (Ind. Ct. App. 1991), for the proposition that "a judge who has adjudicated an underlying cause of action" is strictly prohibited "from testifying regarding an attorney's conduct during that cause of action in a subsequent proceeding." [Citation to Brief omitted.]

In Cornett, the attorney who had represented a client in a dissolution proceeding was subsequently sued for legal malpractice. The client presented testimony of the dissolution judge to the effect that had certain evidence been presented by the attorney for his client, a different ruling would have obtained. Our express holding was "that the judge hearing the underlying action should not testify in a subsequent legal malpractice action." 571 N.E.2d

at 575. Here, Judge Cook's testimony was not considered in a legal malpractice action.

. . . When the trial court ruled to admit the deposition testimony, it indicated it would consider Cook's testimony as to what he observed at trial. We have no reason to believe any inadmissible evidence from the testimony was considered, and we find no error here.

. . . .

[8] Judge Cook testified pursuant to a subpoena.

FRIEDLANDER, J., concurred.

KIRSCH, J., filed a separate written opinion in which he dissented on other issues.

DADO v. JEENINGA, No. 45A03-0004-CV-129, ___ N.E.2d ___ (Ind. Ct. App. Jan. 24, 2001).

BAILEY, J.

In Wiese-GMC [, Inc. v. Wells, 626 N.E.2d 595 (Ind. Ct. App. 1993)], this court stated:

> [T]he fundamental measure of damages in a situation where an item of personal property is damaged, but not destroyed, is the reduction in fair market value caused by the negligence of the tortfeasor. This reduction in fair market value may be proved in any of three ways, depending on the circumstances. First, it may be proved by evidence of the fair market value before and the fair market value after the causative event. *Secondly, it may be proved by evidence of the cost of repair where repair will restore the personal property to its fair market value before the causative event.* Third, the reduction in fair market value may be proved by a combination of evidence of the cost of repair and evidence of the fair market value before the causative event and the fair market value after repair, where repair will not restore the item of personal property to its fair market value before the causative event.

[Citation omitted.] In the order denying Laura's Motion to Correct Errors, the trial court stated that it "used the second method [from Wiese-GMC] of determining the damages in the instant case." [Citation to Record omitted.]

Laura argues that Wendy bore the burden under this standard to establish the fair market value of her car before and after the accident. She reasons that since no such evidence was submitted, the trial court had no basis upon which to conclude that the cost of repairs would restore Wendy's car to its pre-accident fair market value. Laura argues that in the absence of such evidence, the trial court's award of repair costs may present a windfall to Wendy. . . .

It is true that this court has held that when a plaintiff seeks to recover the cost of repairs in a property damage case, "the burden of proof should not shift to the defending party to prove the cost to repair unreasonable, or not reasonably related to the difference between the property's before and after fair market value." Hann v. State, 447 N.E.2d 1144, 1147-48 (Ind. Ct. App. 1983). . . . Wiese-GMC approved our earlier decision in Hann, noting that Hann had "essentially adopted the measure of damages set forth in the Restatement (Second) of Torts." Id. at 598. The Restatement standard provides:

> When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for:
>
> > (a) the difference between the value of the chattel before the harm and the value after the harm or, *at his election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs*, and
> >
> > (b) the loss of use.

Id. (quoting Restatement (Second) of Torts, § 928 (1977), emphasis added).

However, while portions of Hann and Wiese-GMC may be read to support Laura's position, the terms of the evidentiary standards enunciated in those cases and in the Restatement do not. Requiring a plaintiff who elects to prove his damages under Wiese-GMC's second method to introduce evidence of pre- and post-accident fair market value would render the first and third options superfluous. The first option already requires the plaintiff to directly prove the reduction in fair market value. The third option contemplates situations where a Plaintiff may be required to introduce a combination of repair cost and fair market value evidence to prove damages. Engrafting the requirement advanced by Laura onto the second option would render these methods duplicative and redundant.

Similarly, the terms of the Restatement do not support the imposition upon a plaintiff of the burden to negate a windfall by proving pre- and –post-accident fair market value as a precondition to recovery of repair costs. As with the standard articulated in Wiese-GMC, the Restatement standard gives the plaintiff the option of proving his damages *either* by

directly proving the diminution in fair market value, *or* by submitting evidence of cost of repairs. The Restatement goes on to say that the amount of damages evidenced by the cost of repairs may be adjusted to the extent that repair costs are inconsistent with the diminution in value. However, the fact that the Restatement gives the plaintiff the choice to prove his damages by a means other than direct proof of the diminution in value indicates that the need, if any, for the post-hoc adjustment provided for in the rule should be demonstrated by the defendant, and not the plaintiff. . . .

. . . .

Our conclusion is supported by cases from numerous other jurisdictions, which hold that when a plaintiff presents evidence of the cost to repair damaged personal property, the plaintiff makes a prima facie case of his right to recover those costs, and the burden then shifts to the defendant to show that recovery of the repair costs will produce an over-recovery. . . .

. . . Wendy was required to make an initial prima facie showing that the repairs contemplated in the estimates would fix the damages caused by Laura's accident and restore the vehicle to its pre-accident condition. Wendy made such a showing. At trial, she introduced photographs of her car, apparently highlighting the damages caused by Laura's accident, as well as two estimates of the cost to repair those damages. . . . The trial court could have reasonably deduced from the evidence presented that the pre-accident value of Wendy's car, whatever that might have been, was diminished as a result of the damage occasioned by Laura's accident. The trial court could have further concluded that if the damage caused by the accident was fixed, the value of the vehicle lost in the accident would be restored. . . . [I]t was incumbent upon Laura to show that the cost of the repairs contemplated in the estimates were somehow unrecoverable. Laura presented no such evidence, and did not carry her burden here. . . .

VAIDIK, J., concurred.

SULLIVAN, J., filed a separate written opinion in which he dissented, in part, as follows:

. . . I respectfully dissent . . . from the affirmance as to the damages awarded. . . .

. . . .

Wiese must be read in light of Hann, upon which it relies. Hann clearly requires the plaintiff, when utilizing the cost of repair, to additionally prove that such cost bears a "reasonable relationship to the difference between the fair market value of the property just before and just after the traumatic event." 447 N.E.2d 1147. I fail to see how this relationship might be shown without poof [sic] of the before and after values.

Be that as it may, the Second option, with which we are here concerned, requires proof that the cost of repairs will restore the property to its fair market

value before the causative event. Once again I fail to see how that burden could be carried without establishment of the before value.

. . . .

Although I agree that, at least in a small claims setting, the new rule has much to recommend it both as to fairness and ease of application,[2] such change should come about through our Supreme Court, whether by amendment of the Small Claims Rules or by judicial decision.

---

[2] This view may account for the adoption of the cost of repair rule in the some twelve jurisdictions cited by the majority.

CASE CLIPS TRANSFER TABLE

November 16, 2001

This table lists recent grants of transfer by the Indiana Supreme Court for published decisions of the Court of Appeals. It includes Judicial Center summaries of the opinions of the Court of Appeals vacated by the transfers and of the Supreme Court's opinions on transfer.

A CASE CLIPS transfer information feature was suggested by the Justices of the Indiana Supreme Court in response to trial court requests for more accessible information about grants of transfer. The table is prepared with assistance from the Supreme Court Administrator's Office, which sends the Judicial Center a weekly list of transfer grants.

A grant of transfer vacates the opinion of the Court of Appeals: "[i]f transfer be granted, the judgment and opinion or memorandum decision of the Court of Appeals shall thereupon be vacated and held for naught, except as to any portion thereof which is expressly adopted and incorporated by reference by the Supreme Court, and further, except where summarily affirmed by the Supreme Court." Indiana Appellate Rule 11(B)(3).

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Owens Corning Fiberglass v. Cobb	714 N.E.2d 295 49A04-9801-CV-46	Defense should have received summary judgment as plaintiff showed only that he might have been exposed to its asbestos	01-19-00	
Sears Roebuck & Co. v. Manuilov	715 N.E.2d 968 73A01-9805-CV-193	(1) evidence of plaintiff's domestic violence before and after slip and fall was admissible, given his expert's opinion malingerers are often wife beaters and plaintiff told him he did not abuse spouse; (2) physician's opinion plaintiff had post-concussion syndrome caused by fall was inadmissible given testimony that scientific cause of syn-drome was unknown and expert had not eliminated other possible causes; and (3) a psychiatrist was incompetent to opine about physical brain damage and about the likelihood of the plaintiff resuming his career.	2-17-00	
Krise v. State	718 N.E.2d 1136 16A05-9809-CR-460	(1) officers' entry into home to serve body attachment not illegal; (2) roommate gave voluntary consent to search; (3) scope of consent extended to defendant's purse located in common bathroom	2-17-00	
Elmer Buchta Trucking v. Stanley	713 N.E.2d 925 14A01-9805-CV-164	(1) Wrongful Death Act mandates recovery of the entire amount of a decedent's lost earnings without an offset for personal maintenance, and (2) defense not entitled to instruction that action not to punish defendant and that any award of damages could not include compensation for grief, sorrow, or wounded feelings	2-17-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Hancock v. State	720 N.E.2d 1241 34A02-9808-CR-657	Conviction for breath-alcohol formulation of I.C. 9-30-5-1, not challenged at trial but later held unenforceable in Court of Appeals' *Sales v. State*, was fundamental error [Note - *Sales* was vacated by transfer 1-18-00 and statute held enforceable in opinion at 723 N.E.2d 416]	2-22-00	
Rheem Mfg. v. Phelps Htg. & Air Cond.	714 N.E.2d 1218, 49A02-9807-CV-620	1) failure of essential purpose of con-tract's limited remedy does not, without more, invalidate a wholly distinct term excluding consequential damages; (2) genuine issues of material fact as to whether the cumulative effect of manufacturer's actions was commercially reasonable precluded summary judgment as to validity of consequential damages exclusion; and (3) genuine issues of material fact as to whether distributor acted as manufacturer's agent precluded summary judgment as to warranty claims	3-23-00	
Noble County v. Rogers	717 N.E.2d 591 57A03-9903-CV-124	Claim brought against governmental entity under Trial Rules for wrongfully enjoining a party is not barred by immunity provisions of Indiana Tort Claims Act.	3-23-00	
G & N Aircraft, Inc. v. Boehm	703 N.E.2d 665 49A02-9708-CV-323,	(1) evidence was sufficient to support breach of fiduciary duty claim against majority shareholder; (2) order directing corporation and majority shareholder to buy out minority shareholder at full value of his shares did not violate appraisal provision of dissenter's rights statute; (3) evidence supported finding that corporation breached fiduciary duty to minority .	3-23-00	
Latta v. State	722 N.E.2d 389 46A02-9811-PC-478	Dual representation of wife and husband in murder prosecution left wife with ineffective assistance of counsel, when husband invoked privilege to remain silent when questioned about wife's role, his silence was used against the wife, and counsel did not cross-examine him about his silence, and when counsel's final argument asked jury to assume husband's confession was to cover up wife's crime	3-29-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Lockett v. State	720 N.E.2d 762 02A03-9905-CR-184	Officer's question whether motorist had any weapons in the car or on his person impermissibly expanded a legitimate traffic stop	3-29-00	
Clear Creek Conservancy District v. Kirkbride	719 N.E.2d 852 67A05-9904-CV-152	Failure to use statutory opportunities to protest and attend hearing on conservancy district assessments did not preclude Trial Rule 60(B)(1) excusable neglect relief from assessments	4-12-00	
Galligan v. Galligan	712 N.E.2d 1028 10A01-9807-CV-256	Minority shareholders were not limited to statutory appraisal remedy against corporation and could sue individual directors, when sale of corporate assets was not in compliance with appraisal remedy sale requirements	4-12-00	
Durham v. U-haul International	722 N.E.2d 355 49A02-9811-CV-940	Punitive damages are available in wrongful death actions	5-04-00	
Fratus v. Marion Community School Board	721 N.E.2d 280 27A02-9901-CV-12	(1) Indiana Education Employment Relations Board (IEERB) did not have jurisdiction over teachers' claim against union for breach of its duty of fair representation, and (2) IEERB did not have jurisdiction over teachers' tort and breach of contract claims against school board	5-04-00	
Bemenderfer v. Williams	720 N.E.2d 400 49A02-9808-CV-663	Wrongful death action continues despite death of surviving dependent beneficiary during pendency of the action.	5-04-00	
Carter v. State	724 N.E.2d 281 02A03-9905-PC-191	Guilty plea was properly accepted despite Defendant's statement he was pleading guilty because he could not prove he was innocent, when statement was made at hearing on acceptance of the plea and plea bargain prior to court's accepting it.	5-24-00	
McCarthy v. State	726 N.E.2d 789 37A04-9903-CR-108	Reversible error in teacher's sexual misconduct prosecution to prevent his cross-examination of child's mother about her filing notice of tort claim against school and possible intent to sue defendant personally.	6-08-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Zimmerman v. State	727 N.E.2d 714 77A01-9909-CV-318	Cases hold no appeal lies from a prison disciplinary action, but here inmate could bring a civil mandate action to compel DOC to comply with a clear statutory mandate.	8-15-00	
Troxel v. Troxel	720 N.E.2d 731 71A04-9904-CV-162	Requirement that will must be filed for probate within 3 years of death is jurisdictional and may be raised at any time, not just in will contest within 5 months of admission to probate.	8-15-00	
Turner v. City of Evansville	729 N.E.2d 149 82A05-9908-CV-358	Statutory amendments permitting modifications of merit system ordinance after certain date applied retroactively to city's modifications of its merit system ordinance; police chiefs were "officers" subject to constitutional residency requirement; acts of police chiefs were valid as acts of de facto officers; and agreement between city and union regarding changes to merit system ordinance did not violate non-delegation rule.	8-15-00	
Felsher v. City of Evansville	727 N.E.2d 783 82A04-9910-CV-455	University was entitled to bring claim for invasion of privacy; professor properly enjoined from appropriating "likenesses" of university and officials; professor's actions and behavior did not eliminate need for injunction; and injunction was not overbroad..	8-15-2000	
Dow Chemical v. Ebling	723 N.E.2d 881 22A05-9812-CV-625	State law claims against pesticide manufacturer, with exception of negligent design, were preempted by federal FIFRA pesticide control act; pest control company provided a service and owed duty of care to apartment dwellers, precluding summary judgment.	8-15-00	
Sanchez v. State	732 N.E.2d 165 92A03-9908-CR-322	Instruction that jury could not consider voluntary intoxication evidence did not violate Indiana Constitution	9-05-00	
South Gibson School Board v. Sollman	728 N.E.2d 909 26A01-9906-CV-222	Denying student credit for all course-work he performed in the semester in which he was expelled was arbitrary and capricious; summer school is not included within the period of expulsion which may be imposed for conduct occurring in the first semester	9-14-00	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Johnson v. State	725 N.E.2d 984 71A03-9906-CR-225	Threat element of intimidation crime was not proven by evidence defendant showed his handgun to victim	9-14-00	
Poynter v. State	733 N.E.2d 500 57A03-9911-CR-423	At both pretrials Court advised nonindigent defendant he needed counsel for trial and defendant indicated he knew he had to retain lawyer but was working and had been tired; 2nd pretrial was continued to give more time to retain counsel; trial proceeded when defendant appeared without counsel; record had no clear advice of waiver or dangers of going pro se - conviction reversed.	10-19-00	
Ellis v. State	734 N.E.2d 311 10A05-9908-PC-343	When judge rejected 1st plea bargain he stated specifically what he would accept; 2nd agreement incorporated what judge had said was acceptable; P-C.R. denial affirmed, on basis plea voluntary despite judge's "involvement" in bargaining; opinion notes current ABA standards permit court to indicate what it will accept and may be used by trial judges for guidance.	10-19-00	
Moberly v. Day	730 N.E.2d 768 07A01-9906-CV-216	Fact issue as to whether son-in-law was employee or independent contractor precluded a summary judgment declaring no liability under respondeat superior theory; and Comparative Fault Act has abrogated fellow servant doctrine.	10-24-00	
Shambaugh and Koorsen v. Carlisle	730 N.E.2d 796 02A03-9908-CV-325	Elevator passenger who was injured when elevator stopped and reversed directions after receiving false fire alarm signal brought negligence action against contractors that installed electrical wiring and fire alarm system in building. Held: contractors did not have control of elevator at time of accident and thus could not be held liable under doctrine of res ipsa loquitur.		

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
S.T. v. State	733 N.E.2d 937 20A03-9912-JV-480	No ineffective assistance when (1) defense counsel failed to move to exclude two police witnesses due to state's failure to file witness list in compliance with local rule and (2) failed to show cause for defense failure to file its witness list under local rule with result that both defense witnesses were excluded on state's motion	10-24-00	
Tapia v. State	734 N.E.2d 307 45A03-9908-PC-304	Reverses refusal to allow PCR amendment sought 2 weeks prior to hearing or to allow withdrawal of petition without prejudice	11-17-00	
Tincher v. Davidson	731 N.E.2d 485 49A05-9912-CV-534	Affirms mistrial based on jury's failures to make comparative fault damage calculations correctly	11-22-00	
Burton v. Estate of Davis	730 N.E.2d 800 39A05-9910-CV-468	Wrongful death and survival statutes allow estate of deceased motorist to bring claim against other motorist and employer for tort of intentional interference with civil litigation by spoliation of evidence from the automobile accident	11-22-00	
Brown v. Branch	733 N.E.2d 17 07A04-9907-CV-339	Oral promise to give house to girlfriend if she moved back not within the statute of frauds.	11-22-00	
New Castle Lodge v. St. Board of Tx. Comm.	733 N.E.2d 36 49T10-9701-TA-113	Fraternal organization which owned lodge building was entitled to partial property tax exemption	11-22-00	
Gallant Ins. Co. v. Isaac	732 N.E.2d 1262 49A02-0001-CV-56	Insurer 's agent had "inherent authority" to bind insurer, applying case holding corp. president had inherent authority to bind corp. to contract	11-22-00	
Reeder v. State	732 N.E.2d 1246 49A05-9909-CV-416	When filed, expert's affidavit sufficed to avoid summary judgment but affiant's death after the filing made his affidavit inadmissible and hence summary judgment properly granted.	1-11-01	
Holley v. Childress	732 N.E.2d 1246 67A05-9905-JV-321	Facts did not suffice to overcome presumption non-custodial parent was fit so that temporary guardianship for deceased custodial parent's new spouse was error.	1-11-01	

Case Name	N.E.2d citation, Ct. Appeals No.	Court of Appeals Holding Vacated by Transfer Grant	Transfer Granted	Supreme Court Opinion After Transfer
Cannon v. Cannon	729 N.E.2d 1043 49A05-9908-CV-366	Affirms decision to deny maintenance for spouse with ailments but who generated income with garage sales	1-11-01	
City of New Haven v. Reichhart and Chemical Waste Mgmt. of IN	729 N.E.2d 600 99A02-9904-CV-247	Challenge to annexation financed by defendant's employer was exercise of First Amendment petition right and 12(B)(6) dismissal of city's malicious prosecution claim was properly granted.	1-11-01	
Davidson v. State	735 N.E.2d 325 22A01-0004-PC-116	Ineffective assistance for counsel not to have demanded mandatory severance of charges of "same or similar character" when failure to do so resulted in court's having discretion to order consecutive sentences.	1-17-01	
Griffin v. State	735 N.E.2d 258 49A02-9909-CR-647	Three opinion resolution on admissibility under Ev. Rule 606 of juror affidavits on participation of alternate in deliberations - op. 1 affidavits inadmissible; op 2 affidavits admissible but no prejudice shown, op 3 affidavits admissible and prejudice	1-17-01	

CASE CLIPS is published by the
Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
Jane Seigel, Executive Director
Michael J. McMahon, Director of Research
Thomas R. Hamill, Staff Attorney
Thomas A. Mitcham, Production
The Judicial Center is the staff agency for the Judicial Conference of Indiana and serves Indiana Judges and court personnel by providing educational programs, publications and research assistance.